IN THE MATTER OF A COMPLAINT FILED ON OCTOBER 16, 1989 BY ANN M. ELKAS AGAINST THE BLUSH STOP, INC., ALAM KHWAJA, DIANE ROBERTSON, 601789 ONTARIO LIMITED AND 815673 ONTARIO LIMITED, ALLEGING DISCRIMINATION BECAUSE OF HANDICAP UNDER SECTION 4 [now 5] (1) and 8 [now 9] OF THE *ONTARIO HUMAN RIGHTS CODE*, R.S.O. 1990, c.H. 19.

Appearances:

Naomi Overend, counsel for the Ontario Human Rights Commission

Mark Geiger (assisted by Minami Ganaha),
counsel for Diane Robertson

Alam Khwaja, in his own behalf

Before: W. Gunther Plaut, Board of Inquiry

All hearings were held in Toronto,
on June 1 and 6 (by conference calls), October 4, 5; November 8, 9;
December 2, 13, 1993; January 25, March 10, 1994
Further submissions were requested, and were received on April 21, 1994.

DECISION

Background

Ms. Ann Elkas ("Complainant"), had been employed by Blush Stop Inc. in Sault Ste. Marie for two years when, during working hours on May 8, 1989, she felt terrible pains in her leg, causing her to seek immediate medical help from her physician, Dr. Brooks. She was advised to report forthwith to Dr. Conley, a specialist at Plummer Hospital, returned briefly to her workplace to arrange with her assistant to cover her absence, and then went to hospital, where the specialist diagnosed her as suffering from deep vein thrombosis.

She telephoned company headquarters in Metro Toronto, informing them of her illness, which would require sick leave, and asked that necessary papers be sent to her. Subsequently, the Vice-President of the company, Ms. Diane Robertson (one of the Respondents), telephoned her, to inquire after her health. There is disagreement over some other parts of their conversations, especially whether Complainant had indicated the amount of time she would likely have to be absent from work. Meanwhile, her assistant, Ms. Kim Bews - a part-time employee - filled in for her.

A statement, issued on Dr. Douglas Brooks's stationery, indicated that she would be ready to return to work on June 1, and this document was forwarded to Respondents' headquarters[1] (Exhibit 5). Respondents claim that they received no further medical advice. Complainant testified that other medical documents and requests for medical forms were sent to the

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[1] Blush Stop Inc. became the corporate, and Ms. Robertson and Mr. Khwaja, the personal Respondents.

company, but there was disagreement over what was and what was not submitted.

About June 23, she claims, the Complainant told headquarters she would be off for another month, but immediately afterwards found that ads for "help sought" were placed in the local press, which promised full benefits for work at Blush Stop Inc. Complainant - believing that only full-time personnel were entitled to full benefits, and she being the single full-time employee - interpreted the ads to mean that her own position was at stake. (The meaning and effect of the ads were disputed.)

Complainant contacted the local office of the Ontario Human Rights Commission ("Commission") and after a while was informed by the officer, Ms. Leslie Zack-Caraballo, that she had learned that Complainant's job had been terminated. The accuracy of this information was also a matter of extensive dispute. No complaint had been filed as yet.

Throughout her illness Complainant was in touch with Ms. Bews, assisting her as much as possible over the telephone, and in late August was able to pay a visit to her workplace. She also testified that Ms. Robertson had been unhappy that the Complainant, before speaking to her, had contacted the Commission. This testimony, as well as the supposed reprisal arising therefrom, were further bones of contention.

Complainant said that she was ready to return to work in September 1989, starting with half-time the first week and full-time thereafter. Respondents vigorously disagree that they had ever been apprised of these plans. When Ms. Elkas did show up at work on Sept. 11, she was informed that her job had been terminated and that she was to hand in her keys.

Ms. Elkas subsequently laid her complaint, which she signed on October 10,1989.[2]

Hearings before this Board of Inquiry commenced some four years after Ms. Elkas became incapacitated. Even though, outside of the parties themselves, only two witnesses were called, proceedings were spread out over ten months and were marked by lengthy examinations of witnesses, extended argument, and considerable acrimony between counsel. It should be noted that the parties themselves did not participate in these exchanges and, indeed, spoke highly of each other.

In assessing the contending claims, this Board was struck by the unhappy confluence of two separate misfortunes. On the one hand, Complainant suffered a painful illness which led to her loss of employment. Respondents, in their turn, became victims of the recession and lost their business, a loss that impacted severely also on their personal finances.

Other problems obtruded. Because the investigation by the Commission and the eventual appointment of a board of inquiry took years, a number of developments occurred which made a clear resolution of the conflict difficult.

One: The collapse of Blush Stop Inc. directed the attention of the personal respondents, Ms. Diane Robertson and Mr. Alam Khwaja, to their own pressing affairs, which had taken a disastrous turn.

Two: The comptroller of Blush Stop Inc., Mr. Ron Gough, became unavailable to the hearing, because he was reputed to be ill and his address was unknown. This board believes that an assessment of claims and counter-claims would have been greatly facilitated had the inordinate de-

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[2] The complaint lists the parties noted in footnote 1; later on, two successor companies were also named.

lay of the proceedings not eliminated the information which Mr. Gough would likely have been able to provide.

The Complainant as well as the Respondents suffered from the delay, which resulted in justice being impeded. The locus of the hearing required that a portion of the hearings was conducted via long-distance telephone. Meanwhile, Respondents Robertson and Khwaja, who both asserted that they were in severe financial straits, attended the hearings on their own time (and, presumably, expense), with the former in addition incurring considerable legal costs. Ms. Elkas also was absent from her job in order to testify at length and to await the resolution of her complaint after all this time.

The Board thus faced an unhappy scenario, which was increased because of an unusually large number of objections and motions, a tense atmosphere, acrimony and high emotion.

Before I can consider and assess the contended facts, I must deal with legal issues which were laid before me, first and foremost whether Ms. Elkas's illness constitutes a handicap in the meaning of the law.

The *Code*.

Complainant charged that her rights had been infringed under sections 5(1) and 9 of the *Ontario Human Rights Code* ("the *Code*").[3] The provisions read as follows:

> 5(1). Every person has a right to equal treatment with respect to employment without discrimination because of ... handicap.

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[3] Then s. 4(2) and 8. At the beginning of the hearings there was also a motion to add the cause of reprisal (s. 8). This matter will be considered separately toward the end of my Decision.

9. No person shall infringe or do, directly or indirectly, anything that infringes a right under this Part.

S. 10(1) goes on to define the nature of various infringements, and says:

> ..."because of handicap" means for the reason that the person has or has had, or is believed to have or have had,
>
> (a) any degree of physical disability, infirmity, malformation or disfigurement that is caused by bodily injury, birth defect or illness and, without limiting the generality of the foregoing, including diabetes mellitus, epilepsy, any degree of paralysis, amputation, lack of physical coordination, blindness or visual impediment, deafness or hearing impediment, muteness or speech impediment, or physical reliance on a guide dog or on a wheel chair, or other remedial or device...

The section makes it quite clear that the impediments specifically noted are examples only. Did Ms. Elkas, when afflicted with deep vein thrombosis, have a handicap according to this definition?

In the first case summary which the human rights officer prepared, she did not consider Ms. Elkas's ailment a condition covered by s. 10(1). The Commission itself, however, concluded that a board ought to be requested, because an infringement on the basis of handicap was believed to have taken place.

This decision came not long after a landmark ruling by a board of inquiry had been issued in *Ouimette v. Lily Cups Ltd.* (1990),12 C.H.R.R, D/19, which considerably narrowed the application of the section. This led Respondent counsel to suggest that the instant case had been advanced primarily in order to test the limits of the *Ouimette* definition.

This Board had of course no access to the deliberations of the Commission, but wishes to state, *obiter dicta*, that test cases (if the one before us was indeed so intended) have a role to play in the development

of law. To be sure, they ought to be cases which, on their own merits, have sufficient credibility to warrant the considerable expenditure of public moneys which is involved in any proceedings of a board of inquiry. Furthermore, the Commission must also consider the rights of the respondent parties, who will have to expend their own funds if they wish to be represented by competent counsel, quite aside from the physical and psychological stress which defending a law suit will inevitably entail. (Counsel for the Commission, aware of these problems, especially as they affected the progress of the instant case, suggested that it was not my function "to review the weaknesses of the human rights investigation, and ferret these out." Respondent counsel advised me that, in case the complaint was dismissed, he would seek costs from the Commission, in behalf of his client.)

The hearings were marked by a significant number of motions which concerned the admissibility of documents. I followed the general custom of boards of inquiry to admit the documents and judge later whether they ought to be given weight. I further indicated that the reasons for admitting or not admitting them would form part of my final decision. However, as will be seen, the Decision at which I have arrived will render most of these motions moot.

The Purpose of the *Code*.

The *Code* stipulates in s. 10(1) that for a condition to be called a "handicap" it must be the result of an injury, or of a birth defect, or it must be capable of being called an illness.

There can be no question that the kind of affliction which the Complainant suffered was an illness, and this was not contested. In *Horton v. Niagara (Regional Municipality)* (1988) 9 C.H.R.R., D/4611, hypertension

was ruled to be a handicap in the meaning of the law. But the fact that a person has an illness does not necessarily mean that he/she has a handicap.

Hypertension, even when controlled, is most likely a life-long illness, deep vein thrombosis is not. Persons so afflicted may generally be considered cured, though they may have to observe certain cautions. (On the application of these principles to the instant case, see further below.)

The *Code* is silent on the question whether the temporary character of an illness has any effect on its being included under the handicap provision. Since there is no question that Ms. Elkas was for some time incapable of carrying on her duties, was she "handicapped" in the meaning of the law?

This issue was explored at some length in *Ouimette*. The Board concluded that the illness must place an *ongoing* and *substantial* limit on the person. In this interpretation,

> ... it would be wrong to attempt to stretch the meaning of illness under s. 9 [now 10] of the *Code* to include the flu [gastroenteritis]. It would be wrong to do so because of the effect of such a construction on the high purpose otherwise achieved by the interpretation provision in protecting those who are actually or perceived to be materially impaired through illness. (D/33 at ¶ 67)

An earlier Board of Inquiry ruled along similar lines and said that a handicap should be construed to mean something which affects or is perceived to affect an individual in carrying out the important functions of existence:

> Having a handicap means not being able to do one or more important things that most people can do. (*Cameron v. Nel-Gor Castle Nursing Home* (1984), 5 C.H.R.R., D/2180; see also *Morrison v. O'Leary Associates* (1992) 15 C.H.R.R., D/246, at ¶ 58.)

In *Ouimette* (at D/33, ¶64) the Board cited with approval a U.S. District Court decision of 1986, which held:

> ... the very concept of impairment implies a characteristic that is not commonplace and that poses for the particular individual a more general disadvantage in his or her search for satisfactory employment.

This Board agrees with the thrust of these interpretations. The purpose of the *Code* is to protect people who, because of a variety of permanent disabilities, are likely to suffer discrimination. In common parlance, the very word "handicap" is usually not applied to temporary conditions; to do so would change the whole thrust and intent of the law.

Persons so afflicted may avail themselves of other kinds of protection if there are certain consequences of their infirmities. Union and private contracts, workers' compensation laws, sick leave and general practices of employer/employee relations will likely deal with such occurrences. The *Code* aims at the prevention of discrimination, and this is something which must be kept in mind. The principle is quite clear in its broad outline.

Therefore, before this Board can turn to any consideration of the course of events which led to the Complainant's dismissal, the basic question must be answered: was Ms. Elkas's illness a handicap in the meaning of the *Code*? If it was, then the question arises whether the Respondents

Respondents discriminated against her on the basis of handicap; but if it was not, this Board is not entitled to apply the handicap provision of s. 5(1).

Was the Complainant's illness a "handicap"?

The onus to show that deep vein thrombosis is a handicap rests upon the Commission. It introduced letters from the Complainant's physician which addressed various aspects of Ms. Elkas's illness.

On July 1, 1990, Dr. Brooks wrote to the Human Rights Officer as follows:

> In response to your question of what is deep vein thrombosis - it is a clotting of the blood in an inflamed vein in the leg. ... Ms. Elkas is now recovered and her resonsibilities [sic] is to insuring that there is not a re-currence [which] would include the use of support hose when she is up and around and avoidance of prolonged sitting especially in a chair which does not allow her feet to touch the ground. ... Ms. Elkas is capable of resuming her normal activity and at present she appears to be totally recovered from her illness. (Exhibit 19)

The Complainant's illness was thus temporary and her doctor declared her cured. While she had an illness, she did not have a handicap in the meaning of the *Code*.

Was there a "perceived" handicap?

Testimony with regard to the work conditions at Blush Stop elicited the following facts:

The work place was a kiosk in a merchandise mall, that is, a free-standing sales counter stacked with merchandise and accessible from all sides. Stacking the goods, supervising potential customers and selling to them (so uncontradicted testimony showed) required the all-around in-

volvement of the manager. Thus, this type of locale was fundamentally different from an ordinary store. In the latter, employees can rest from time to time and "get off their feet"; in a kiosk operation this is frequently not feasible, unless there is other help available. The manager's work week was about 40 hours, but she had to work additional time in case part-time help did not show up or some other emergency developed.

Respondents believed, rightly or wrongly, that Ms. Elkas's illness prevented her from standing for long hours at a time. They wrote to the Commission officer on May 23, 1990, when the case was under investigation:

> In view of our discussion, and Ms. Elkas's inability to perform the normal duties as Manager, such as prolonged periods of standing, and working at the kiosk as a normal procedure, we do not feel that we have to add anything further in this regard.
>
> Our termination of Ms. Elkas's position was definitely not prejudicial or contrary to the Human Rights Code. We cannot add any more.
>
> In our opinion, she was paid Termination pay and necessary benefits according to the law to the date of the cessation of her employment. (Exhibit 13)

Clearly, Respondents were under the impression that they were not dealing with an issue of discrimination on the basis of handicap but with an ordinary labour matter. They were correct in their assumption.

The *Code* considers discrimination to have occurred not only when a handicap is actually present, but also if it is merely *perceived* to exist. Section 9 of the Code prohibits discrimination "because of handicap," and s. 10(1) begins its definition as follows:

> ... "because of handicap" means for the reason that the person has or has had *or is believed to have had* ... (emphasis added.)

Admittedly, Respondents believed that Ms. Elkas was not fit to return to work, and after several months, with her recovery indefinite, they discharged her. Was their perception a discriminatory act as a *perceived* handicap, even though deep vein thrombosis does not otherwise qualify as a handicap?

To put it differently, may an illness be perceived as being a handicap in the meaning of the *Code*, even though the illness, when cured, turns out not to have been a handicap at all?

This question was addressed in *Horton:*

> Surely, if one were to hold that a person who is *actually* suffering from a non-covered disability is *excluded* from the meaning of the section, it would be illogical to include the disability as a covered ground if it is *only believed to exist but is not real.* ... If they are disabilities not covered by the qualifications alluded to, then they are excluded from the section whether they are real or imagined. ...
>
> As long as the employer [in a case cited] believed that the employee had a handicap which, if the perception was correct would really be a handicap, the case should proceed. Similarly, in the case for our consideration, this vital element required by the *Code* must be shown to be present, namely, [the perceived illnesses] must be shown to be handicap (¶¶ 35784 and 35788).

This view is not in conflict with the decision rendered in *Belliveau v. Steel Co. of Canada* (1988) 9 C.H.R.R., D/5250. The complainant had injured his shoulder and, because his job required heavy lifting, he was not able to perform it without considerable pain. Since no physical improvement in his condition had occurred or was likely to occur, the employer decided that the complainant could not do his job and discharged him.

In the view of the Board the employer should not have made this uninformed decision. It should have taken into consideration the fact that the complainant had decided to accept the presence of permanent pain and do his job anyway. But he was not given the opportunity to prove his ca-

pability. Consequently the Board ruled in his favour, because the employer had failed to test the doctor's assessment and the complainant's will.

However, that decision was based on a scenario which differed from the instant case in one fundamental respect. For by implication, it took the shoulder injury of the worker - which was a permanent affliction - to be a handicap in the meaning of the *Code*, while Ms. Elkas's deep vein thrombosis was not permanent and was fully cured after some months.

In sum, the complaint was based on alleged discrimination on the basis of handicap. But the *Code's* purpose does not cover the condition from which Ms. Elkas suffered, for her illness did not result in a handicap nor could it be termed a perceived handicap.

Reprisal.

At the beginning of the hearings, Commission counsel moved to add reprisal as a further allegation. I agreed to the motion over the objection of Respondent counsel.

Section. 8 of the *Code* reads in part:

> Every person has a right to claim and enforce his or her rights under this Act...without reprisal or threat of reprisal for so doing.

Reprisal is a ground for alleging discrimination which is entirely unconnected to any particular alleged act of discrimination. It stands by itself and is designed to encourage complainants to pursue their rights without fear of recrimination for doing so.

The Commission cited two incidents which, in its opinion, showed that Ms. Elkas's involvement of the Human Rights Commission was one reason for her discharge.

1) Ms. Robertson had declared herself "unhappy" over the fact that Ms. Elkas had gone to the Commission to obtain assistance (see Exhibit 10).

I find this to be an insufficient ground for asserting reprisal. It may in fact be considered an expected and normal response, for the involvement of the Commission in almost any case does have some impact on the business operation of the potential respondent and will generally be felt to be unwelcome. But that sentiment constitutes reprisal only when it can be shown to be a reason for the alleged unlawful activity of the respondent. No such linkage was shown in the instant case.

2) The Commission officer, Ms. Zack-Caraballo, made notes of a telephone conversation with Mr. Khwaja, then President of Blush Stop Inc. She recorded it on June 29, 1989. The first item (as amplified by the witness's testimony) is a response by Mr. Khwaja to an inquiry into Ms. Elkas's status. According to oral testimony, he was greatly put out by her call and, according to her notes, said in part (Exhibit 9):

> ... although employment was not terminated - it will - she will now be.
>
> - she was off about a month ago - last day May 8/89 - we can't wait indefinitely - we may close that location - we are trying to get out of lease.
>
> I'm not sure of disability insurance applies...there is a chance that I will close down that location. - it is [a] good thing for her to have this protect[ion]....if we have anything for her we'll give her a call - we need good trained employees - if she is eligible for disab[ility] - we'll help her as much as we can. (From the officer's hand-written notations.)

These notes were much in contention. To begin with, her listing Mr. Khwaja's telephone number at the top of the page made it appear that she

called him, while she claimed that he called her and she was returning the call.

The opening notation about terminating Ms. Elkas was explained by Mr. Khwaja in the following manner: As far as he was concerned, the call came from an initially unidentified woman. He had no idea who the caller was. Yet she asked him to account for the company's activities. This upset him and occasioned his initial gruff outburst. But once he found out what it was all about, the rest of the conversation became calm and normal -- and Ms. Zack-Caraballo herself testified to his change of voice and demeanour.

Is this conversation sufficient reason to warrant a finding of reprisal? When about four months later Ms. Elkas signed a formal complaint, with Ms. Zack-Caraballo assisting her in drawing it up, reprisal was not mentioned. If it was not mentioned then, nor when the Commission decided to ask for a Board of Inquiry, why would it suddenly be brought up years later?

In view of the scarcity of supporting facts, I found the charge of reprisal to be unwarranted.

Conclusion.

An examination of the meaning of "handicap" leads me to conclude that the illness from which Complainant suffered was not covered under the discrimination definitions of s. 10 of the *Code* as either an actual or perceived handicap.

I further consider the allegation of reprisal to be unsupported.

The complaint is therefore dismissed.

Invitation to Further Submission.

During the hearings I undertook to deal in my final decision with certain legal issues. As indicated above, these have become moot because of the dismissal.

However, inasmuch as Respondent counsel stated that in case of dismissal he would seek costs. I invite him to submit, in writing, his plea for costs, and invite Commission counsel to respond.

Both submissions should be made within two weeks of the receipt of this Decision.

TORONTO, JUNE 16, 1994

W. G. Kent

BOARD OF INQUIRY